

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 3, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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No. 96-0625

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

GARY FOAT AND LOUISE FOAT,

PLAINTIFFS-RESPONDENTS,

v.

THE TORRINGTON COMPANY,
A FOREIGN CORPORATION AND
BADGER BEARING COMPANY,
A WISCONSIN CORPORATION,

DEFENDANTS-APPELLANTS,

ABC INSURANCE COMPANY,
INGERSOLL-RAND COMPANY,
A FOREIGN CORPORATION,
GHI INSURANCE COMPANY,
JKL INSURANCE COMPANY,
MNO INSURANCE COMPANY,
BROWNING MANUFACTURING DIVISION,
PQR INSURANCE COMPANY,
JOHN DOES SHAFT COMPANY,
STU INSURANCE COMPANY,
PETER POE SPIDER COMPANY,
VWX INSURANCE COMPANY,
COMPONENT MANUFACTURING COMPANY,
THE TRAVELERS INSURANCE COMPANY,

**A FOREIGN CORPORATION,
DEFENDANTS.**

APPEAL from a judgment of the circuit court for Milwaukee County: GEORGE A. BURNS, JR., Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. The Torrington Company and Badger Bearing Company (Torrington) appeal from a judgment entered after a jury rendered a verdict of liability and damages against it in favor of Gary Foat and his wife, Louise Foat, in a products liability and negligence cause of action. Torrington raises four claims of error: (1) the trial court failed to impose sanctions against the plaintiffs for destroying and failing to preserve critical evidence; (2) there is no credible evidence to support the jury's findings of causation; (3) a computer simulation depicting defendant's theory of the case and a film of a stress-load test was improperly excluded from evidence; and (4) public policy considerations mandate reversal of the judgment.

Because the trial court did not erroneously exercise its discretion in denying defendant's motion to prohibit plaintiffs from introducing certain evidence as a sanction for the failure to preserve certain other evidence; because there was sufficient credible evidence to support the cause findings in the jury verdict; because the introduction of a computer simulation and a film of a stress-load test would have been unfairly prejudicial and caused undue delay; and, finally, because a reversal for public policy reasons is raised for the first time on appeal, we affirm.

I. BACKGROUND

On March 15, 1990, Gary Foat, an employee of Wisconsin Centrifugal, was using a vertical die casting machine (VCM) owned by Wisconsin Centrifugal. He was in the process of forming a steel casting by a vertical pour procedure when the funnel of the machine detached from the rest of the machine and landed on him, causing severe burns to his lower body, the amputation of his left leg, pelvic fractures, and impotency.

The VCM in question consisted of a vertical shaft contained in a metal framework by means of an upper radial bearing, a middle thrust bearing and a lower radial bearing. It is operated electrically from a source at the bottom of the vertical shaft. There is a base or table attached to the vertical shaft and a vertical cylindrical die attached to the table.

The VCM functioned as follows. The turned-on power causes the shaft and die to rotate. Molten metal is poured into the die through a funnel while the die is rotating. Because of the centrifugal force produced by the rotation of the die, the molten metal would spread uniformly outward on the interior walls of the die. After the appropriate amount of molten metal was poured into the rotating die, the die was rotated until the metal solidified.

If the molten metal was spread uniformly against the wall of the rotating die, the die would remain in equilibrium and the VCM would function properly. If, on the other hand, the equilibrium was lost and the spread of metal was not uniform, the die would become eccentric or function out of sorts, causing unequal weight distribution. Excessive stress on any of the component parts under certain circumstances could result in the machine tearing itself apart.

Foat had access to the VCM by means of a catwalk around the top of the die. On March 15, 1990, he was standing on the platform spraying some substance into the rotating die when he heard a sound like the crack of a 30-06 caliber rifle and observed the die weaving out of control. The VCM then broke apart. The impact threw him off the platform and the 1,000 pound funnel landed on him causing serious injuries.

The VCM in question was built by Wisconsin Centrifugal in 1983 and rebuilt with newly installed bearings two months before the accident. Torrington manufactured and sold to Wisconsin Centrifugal the upper and lower radial bearings with a C-3 fit pursuant to Torrington's advice.

After the accident, the bearings were removed from the VCM by Wisconsin Centrifugal and they eventually were examined by Dr. Terrence Fox, the Foats' expert mechanical engineer, and by Dr. David Bowers, their metallurgical expert. During Bower's examination of the lower radial bearing, a member of his staff inadvertently polished through a void or flaw that had been found in the bearing—destroying it, as well as evidence of any residual impurities that may have constituted the flaw.

Immediately before the jury trial was to commence, Torrington filed a motion in limine to exclude the Foats from offering any testimony from their experts about the alleged impurity or flaw in the lower radial bearing because Dr. Bowers had destroyed the alleged void and failed to preserve a mating edge of the fracture site. The trial court denied the motion.

During trial, Torrington produced, for the first time, a filmed experiment relating to stress load and a computer simulation depicting its theory of the accident, but the trial court denied admission of either piece of proffered

evidence. After a five-week trial, the jury returned a verdict in favor of the Foats, finding that the lower radial bearing manufactured by Torrington was defective and unreasonably dangerous and a cause of Foat's injuries. The jury also found that Torrington was causally negligent with respect to design, manufacture, inspection and testing of the lower radial bearing, and with respect to the engineering analyses provided to Wisconsin Centrifugal. It awarded the Foats \$3.5 million in damages. Torrington now appeals.

II. ANALYSIS

A. *Spoliation of Evidence.*

Torrington claims that the trial court erroneously exercised its discretion in denying its in limine motion to sanction the Foats for destroying evidence of a flaw or void or hole in the lower radial bearing and for failing to preserve the mating surface of the fractured rib attached to the bearing. Torrington contends that the trial court applied the wrong legal standard in denying its motion for sanctions, thereby misusing its discretion.

STANDARD OF REVIEW

A response to a request for the imposition of sanctions for the destruction of evidence or the negligent failure to preserve it is a matter subject to the sound discretion of the trial court. See *Sentry Ins. v. Royal Ins. Co.*, 196 Wis.2d 907, 916, 539 N.W.2d 911, 915 (Ct. App. 1995); *Milwaukee Constructors II v. Milwaukee Metro. Sewerage Dist.*, 177 Wis.2d 523, 529, 502 N.W.2d 881, 883 (Ct. App. 1993). The core issue is not whether this court, as an original matter, would have exercised its discretion in the same manner, but whether the trial court exercised its discretion free of error. We shall not find error if the trial

court examined the relevant facts, applied a proper standard of law and, utilizing a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *See Johnson v. Allis Chalmers Corp.*, 162 Wis.2d 261, 273, 470 N.W.2d 859, 863 (1991).

DISCUSSION

Because both parties rely on *Milwaukee Constructors* and *Sentry* to support their respective positions, we revisit these decisions to extrapolate whatever consistent rubrics exist to assist us in resolving this claim of error. We reversed the trial court in *Milwaukee Constructors* for its imposition of sanctions. In *Sentry*, we affirmed. Both cases involved the destruction of evidence. In *Milwaukee Constructors*, the trial court dismissed the action as the ultimate sanction for the destruction of documents, *see id.*, 177 Wis.2d at 531-32, 502 N.W.2d at 884; whereas in *Sentry*, the trial court precluded the introduction of any evidence concerning the condition of a refrigerator that allegedly was the cause of a fire after the component parts of the refrigerator had been removed and the refrigerator itself destroyed. *See id.*, 196 Wis.2d at 917-18, 539 N.W.2d at 915.

Although our disposition of each appeal was different, certain compatible and consistent principles emerged from both decisions. In *Milwaukee Constructors*, we concluded that the record did not supply the factual underpinning for conduct egregious enough to warrant dismissal as a sanction, and remanded with instructions as to what factors ought to be considered in arriving at an appropriate sanction. *See id.*, 177 Wis.2d at 537-38, 502 N.W.2d at 886-87. In contrast, we concluded in *Sentry* that the trial court had engaged in an appropriate

fact-finding process to support its sanction.¹ *See id.*, 196 Wis.2d at 919, 539 N.W.2d at 916.

In *Milwaukee Constructors*, we declared that a trial court has “a broad canvas upon which to paint in determining what sanctions” are appropriate, be it for negligent or intentional destruction of evidence. *Id.*, 177 Wis.2d at 538, 502 N.W.2d at 887. We then set forth factors helpful for such a review: (1) was relevant evidence destroyed; (2) does a duplicate exist; and (3) how does the absence of any relevant evidence impair the opponent’s ability to establish its pertinent claims or defenses. *See id.* *Sentry* applied this methodology.

From a collective consideration of these two decisions, we conclude that when a trial court is faced with a motion for sanctions for the destruction of evidence, it must engage in a two-step process. It must first determine the nature of the conduct that gave rise to destruction of the evidence, and then decide whether the absence of this evidence so handicapped the moving party that an unfair advantage was gained by that party’s inability to provide a basis for the claim or defense. Common sense dictates that both prongs of the exercise ought to be complete before a sanction is proper. Findings of fact will be reviewed pursuant to *Noll v. Dimiceli’s, Inc.*, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983), clearly erroneous standard. In light of this synopsis, we now review the actions of the trial court.²

¹ The trial court in *Sentry Ins. v. Royal Ins. Co.*, 196 Wis.2d 907, 539 N.W.2d 911 (Ct. App. 1995), found implicitly as a fact that the removal of the component parts and disposal of the refrigerator prevented the opponent from adequately testing the refrigerator, a finding abundantly supported by the record. *See id.* The trial court concluded that because of the dual nature of the destruction of evidence, both negligence and intentional conduct were present. *See id.*

² When the trial court decided this motion during June 1995, it did not have the benefit of our decision in *Sentry*, released September 19, 1995.

The trial court concluded that Torrington had not met its burden of showing that the Foats, through Dr. Bowers, had intentionally destroyed the evidence in question or that Torrington was unfairly prejudiced in its ability to discover and investigate the cause of the fracture in the bearing. Torrington contends that the trial court applied the wrong standard of law by focusing on whether Bowers's conduct was "egregious" rather than "negligent." It argues that when the duty to preserve relevant evidence has been breached, prejudice is implied and a sanction must follow. Torrington's leap in logic is not warranted by *Milwaukee Constructors* or *Sentry*. In essence, our two decisions required evidentiary support for findings of fact to not be clearly erroneous relating to the loss of evidence and the consequences of such loss.³ Whether the conduct was intentional or negligent may not be as crucial as whether, under the circumstances, it was prejudicial.

In determining the motion of Torrington, the trial court concentrated its attention on the affidavits and deposition of Dr. Walter Littman, Torrington's expert, and Dr. Bowers, who carried the laboring oar for the Foats. Littman concluded that because the void in the lower radial bearing had been destroyed, he was unable to perform an energy-dispersive x-ray spectroscopy (EDS) analysis of the flaw/void to determine the origin of the fracture. Littman also complained that Bowers had damaged the mating surface of the fracture so he could not determine if the void had left an impression on the mating fracture surface.

³ In reviewing whether there was a correct exercise of judicial discretion, the test is not whether the trial court uttered certain prescribed words, but whether there is an adequate factual underpinning to support the conclusion that the conduct that occurred did not unfairly prejudice Torrington's defense.

In opposition to the motion, Bowers submitted an affidavit describing the procedure he followed, which was the standard procedure followed in the metallurgical community for failure analysis. The procedure included marking of parts, photographing, and documenting each step in the process. A standard and accepted technique of analysis was used to determine the source of the void. The technique required polishing near the void to identify impurities in the metal in the vicinity of the void. During the polishing process, the plane of the void was inadvertently polished, thereby removing the void. Bowers concluded that the removal of the void under the circumstances was inconsequential because its existence was well documented. Bowers rejected Littman's need for an EDS analysis because, although EDS is a process sometimes used to identify impurities occupying a void, it is not used to verify the existence of a void. Furthermore, an EDS analysis would only reflect elements in steel because whatever elements created the void had dropped out and created a hole before coming into the possession of Bower.

The trial court, in referring to Littman's deposition, noted that although Littman complained that the destruction of the area of the alleged flaw placed serious and critical restraints on his ability to independently generate an opinion about the flaw, he nonetheless was able to give an opinion to a reasonable degree of certainty without the destroyed evidence. It further noted that Littman claimed if he had been able to perform a nondestructive chemical analysis, the data he acquired would have provided further evidence of whether the alleged flaw was a manufacturing defect. Lastly, Littman claimed his opinion would be further supported if he had been present for Bowers's examination or "even if I had viewed the bearing before the destructive testing." The trial court noted that there

was no evidence that Bowers purposefully destroyed evidence to affect the outcome of the claim.

From this review of the trial court's analysis of the record, it is clear the court realized its role as a fact finder. Here, as in *Sentry* and unlike *Milwaukee Constructors*, it made findings of fact from the relevant evidence. Before doing so, it examined the diametrically opposed theories of the experts and the bases for the expert opinions. Its reasoning noted inconsistencies in Torrington's position. First, as a fact finder, it determined that the results of the destructive testing had more reliability than the nondestructive method proposed by Littman. Second, it found that the photos, documentation, and specimens taken by Bowers allowed anyone to perform additional independent examinations and evaluations in accordance with customary and metallurgical laboratory standards. Finally, it concluded that Bowers did not intentionally destroy the evidence in an effort to defeat the basis for Torrington's defense, and the result did not unfairly prejudice its position. The record supports the findings of fact which, in turn, support the trial court's conclusion of law. There was no erroneous exercise of discretion.

B. Evidence to Support Causation Finding.

Torrington's second claim of error is that there is insufficient evidence to support the jury's two causation findings; i.e., (1) the defective condition of the lower radial bearing was a cause of the accident and resulting injuries to Foat; and (2) the negligence of Torrington with respect to the design, manufacture, inspection, testing of the lower bearing and engineering analysis was also a cause of the accident and injuries.

STANDARD OF REVIEW

A verdict will be sustained if there is any credible evidence to support it. *See Meurer v. ITT Gen. Controls*, 90 Wis.2d 438, 450, 280 N.W.2d 156, 162 (1979). When the verdict has the trial court's approval, this is all the more true. *See id.* The credibility of the witnesses and the weight afforded their individual testimony, even in the face of conflicting testimony, is left to the province of the jury. *See State v. Friday*, 147 Wis.2d 359, 370-71, 434 N.W.2d 85, 89 (1989). Where more than one reasonable inference may be drawn from the evidence adduced at trial, this court must accept the inference drawn by the jury. *See Cogswell v. Robertshaw Controls Co.*, 87 Wis.2d 243, 250, 274 N.W.2d 647, 650 (1979). It is this court's duty to search for credible evidence to sustain the jury's verdict. We are not to search the record for evidence to sustain a verdict that the jury could have reached, but did not. *See Meurer*, 90 Wis.2d at 450-51, 280 N.W.2d at 162-63.

DISCUSSION

Torrington's assertions to support this contention are multi-faceted. It argues that the Foats did not present any evidence that the inclusion here, which measured .002 x .003 x .001 inches, would create such a large stress raiser sufficient to reduce the load-bearing capacity of the steel by some 75-80%. It supports its position by opinions of its experts, a learned treatise, and reference to the American Society of Testing Materials Standards of production of bearing steel. It concludes that there is no evidence that the alleged impurity was capable of causing the rib to fracture at 20-25% of its rated load capacity. We are not persuaded.

There is no dispute, this complex five-week trial was a battle of experts presenting evidence of a highly technical nature. The contents of the

appellate briefs present just the tip of the iceberg. The record reveals that, with rare exception, was any proffered expert opinion left uncontroverted and then the controversion rebutted. The record thus presents us with a classic case of a jury finding ultimate facts in the process of reaching a verdict.

To keep properly focused it is helpful to recall the essence of Torrington's defense. Through its experts it posited that the cause of the accident was not a flaw in a bearing, but differential heating of the base or table of the VCM and its shaft which caused a loosening of the fit between the table and the shaft. This condition produced a bending of the shaft and a fracturing of the rib bearing. Torrington posited that the fracturing did not originate at the cite of the void. Rather, the void was simply a part of a thermally induced crack caused by differential heating.

In support of this contention, Torrington presumptively argues that the theory of the Foats' claim is as follows: the accident occurred when the lower bearing rib fractured at 20-25% of its rated capacity because of an inclusion in the rib, which fell out during the sequence of events which led to the accident. Even though the Foats introduced evidence that the flaw/void will produce an increase in stress sufficient to reduce the load-bearing capacity of steel by some 75-80%, they did not present any evidence that an inclusion would create such a large stress raiser sufficient to reduce the load-bearing capacity of steel by that percentage. Torrington asserts that because there is no evidence that the inclusion was capable of causing the rib to fracture at 20-25% of its rated load capacity, the jury's causation finding is not supported by any credible evidence.

Crucial to the Foats' claim is the presence of a void or flaw which could create a "stress raiser" or multiplier of at least three-to-five times the actual

stress load acting on the rib at the time of the fracture. The excess clearance was responsible for the 10,000-15,000 stress load on the bearing rib. The presence of a void would further reduce the stress load capacity of the rib by 80%, thus creating a condition of insufficient load capacity contributing to the fracture.

Torrington also claims there is no evidentiary support to conclude that the alleged void found after the accident was present in the rib either before or at the time of the accident. Our review of the record reveals, Torrington's protestations notwithstanding, that two of Foats' experts, Dr. Fox, a mechanical engineer, and Dr. Bowers, a metallurgist, examined the circumstances of the accident in tandem, and both concluded that the impurity found its way into the metal during the manufacturing process. Fox's main task was to examine the lower radial bearing. He opined that the flaw or the introduction of an impurity in the bearing steel was created during the manufacturing of the steel. In relative terms it was excessively large, was the origin of the fracture, and rendered the bearing defective and unreasonably dangerous. He further maintained that during the final inspection process of the bearing steel, a standard magna flux test would have detected the flaw. Failure to employ the magna flux test constituted unreasonable quality control. Finally, on the basis of a metrology measurement, he determined that the bearing was not manufactured according to the specifications in that it possessed such excessive clearance that it permitted the shaft to flex in the VCM and weaving in the die which created enough force to bend the shaft and fracture the rib.

After concluding his examination, Fox opined that the excessive clearance in the C-3 fit was the initiating factor in the subsequent sequence of events resulting in the fracture of the rib. He concluded that the excess clearance caused the die to lean, creating a sway, which resulted in the molten metal

migrating to one side of the die, producing the eccentricity which caused the shaft to flex more. This placed more stress on the rib of the bearing. The bearing was defective because of the flaw that was present, which affected its strength. He further opined that the large void so affected the strength of the bearing that it fractured at one-third to one-fifth its strength. He disagreed that differential heating was involved in the incident and expressed his view that the rib failed because of the presence of the flaw.

Torrington's counsel challenged Fox as to whether he could mathematically support his opinion. Fox accepted the challenge and explained to the jury on an exhibit his analysis and then offered to redo his calculations but, for some reason, the matter was not pursued. He, in effect, maintained that the excessive clearance and defective bearing were substantial contributing causes of this accident.⁴

Dr. Bowers testified that the void was a manufacturing defect created by an impurity. He stated that the defect was a void that would create a stress concentration at which a fracture could originate at a load less than full capacity. He opined that magna flux testing would have detected the void and the failure to perform this test did not constitute reasonable quality control.

The Foats' claim was not only based on product liability, but also on negligence. The jury heard evidence that there was unreasonable engineering

⁴ Torrington introduced into evidence a learned treatise entitled *Rapid Fracture in Bearing Steel*, 1 FRACTURE 201 (1977), authored by B.L. Averbach to show that a flaw the size of the one involved in this case did not pose any significant risk. On cross-examination, the Foats' counsel used it for the diametrically opposite purpose. Torrington additionally presented documentary evidence that it had violated no industry standards. The Foats' experts totally disagreed. Thus, we are presented with a weight and credibility question for the jury.

judgment on Torrington's part in formulating the specifications for the C-3 fit, in not including fluid mechanics in its analysis, and in failing to consider dynamic deflection of the shaft. The jury also heard evidence of additional error in quality control in failing to include an analysis of radial loads and not testing by magna fluxing all the components of the bearing.

From this review we are more than satisfied that there was sufficient evidence in the record to support the jury's answers in the verdict question pertaining to causation. Therefore, we reject this claim.

C. Exclusion of Evidence.

Next, Torrington claims the trial court erroneously exercised its discretion by excluding two films from evidence. Both films were presented to the Foats' counsel just prior to the close of their case in chief. The first film was a computer simulation of five-to-ten minutes duration depicting the principles of differential heating, fretting, loosening of the table and shaft fit and other aspects of Torrington's theory of the accident. The film was based upon evidence in the record and illustrated facts and principles referred to by the Foats' experts. The second film depicted a rib stress load experiment that Dr. Littman prepared during the trial to show that the bearing rib could not have fractured under the load which existed here. The Foats' counsel moved, under § 904.03, STATS., to exclude both the film of the stress load experiment which he had received two days before and the second film he had yet to receive. The trial court granted the motion based primarily on considerations of unfairness from surprise and undue delay.

STANDARD OF REVIEW

Whether demonstrative evidence is to be received rests largely with the discretion of the trial court. See *Hernke v. Northern Ins. Co.*, 20 Wis.2d 352, 359, 122 N.W.2d 395, 399 (1963). The party offering an item of demonstrative evidence must establish its probative value and relevancy. Doubtless, films relating to the issues at trial may have some relevancy but, under § 904.03, STATS., relevant evidence may be excluded on the ground of surprise if its “probative value is substantially outweighed by the danger of unfair prejudice or ... undue delay.” *Meurer*, 90 Wis.2d at 454, 280 N.W.2d at 164. Factors to consider in determining whether the exclusion of evidence was a proper act of discretion are: the reasons given for the trial court’s ruling, the opportunity the surprised party had to evaluate the proffered evidence, and the extent to which the surprised party will be prepared to cross-examine concerning the proffered evidence. See *id.* at 455, 280 N.W.2d at 164-65. Excluding relevant evidence is a drastic measure and should be avoided by giving the surprised party a continuance to prepare unless a continuance would result in an unusually long delay. See *State v. O’Connor*, 77 Wis.2d 261, 287-88, 252 N.W.2d 671, 682 (1977).

DISCUSSION

Torrington claims the trial court erred in denying admission of these films for the following reasons. First, as to the computer simulation film, Torrington argues because the Foats failed to show prejudice or undue delay, there was an erroneous exercise of discretion. Second, the Foats made no attempt to show that if some delay were required, a reasonable continuance would have been unworkable.

As for the rib stress load test, Torrington faults the trial court for never determining the relevancy of the film. It contends the Foats presented no

evidence to show how much time would be needed to review and respond to the experiment, nor did the Foats' counsel show that any continuance would be unworkable. Finally, Torrington asserts that the trial court failed to make the required finding that an unduly long continuance would be necessary. We are not convinced.

The hearing to determine admissibility revealed that the stress test film was given to the Foats' counsel two days before the hearing and just before he was prepared to rest his case. It was prepared after the first week of trial. The Foats' counsel argued that the test was performed on equipment and involved concepts that he had never seen. The test was designed to duplicate the accident forces on the bearing and related to the primary issue in the case of whether the thrust rib could withstand certain forces. The Foats' counsel argued that since the test was not disclosed by any of Torrington's experts at depositions, its existence came as a surprise and constituted trial by "ambush." He contended it was impossible to adequately prepare a response because his experts would need to study the equipment used by the defense experts and this would necessarily be time consuming. He argued the bearing used would have to be analyzed, and his experts would have to prepare him for cross-examination of Dr. Littman who would be using the video test. Lastly, counsel suggested that if he had been informed of the test in a timely fashion, it very well could have affected his trial strategy.

Remarkably, during Torrington's counsel's motion argument, he informed the trial court of yet another video he intended to introduce but had not given to opposing counsel. This film was the computer simulation prepared during the trial to illustrate Torrington's theory of the case.

In reply to the attempt to introduce the second video, the Foats' counsel observed he had trouble responding because he had not seen the film. Basically, however, his objection was the same as for the first film, adding that a determination would have to be made whether the films portrayed substantially similar circumstances. There was no offer of proof made to show the second film.

The trial court, in its oral decision, recognized, in respect to the rib stress test video, that the defense was not attempting to duplicate the accident but merely to demonstrate one component of the dynamics of the accident. It referred to § 904.03, STATS. It stated its well-based belief that Torrington's experts would set forth in detail the thesis of the defense that the lower bearing did not cause the accident, but its defective condition was an effect of the accident. It found that the video demonstrations were of such an esoteric nature that they should have been completed and handed over to opposing counsel long before trial. It recognized that an evidentiary hearing would be required. If sufficient similarity was established, plaintiff's counsel would then have to be allowed to reengage his experts to prepare a response. The court observed that the scheduled three-week trial had been extended into the fourth week. The court opined that to allow the introduction of the two videos during trial, even though they might be relevant, would be a "strained application of 904.03."

As for the computer simulation, the trial court recognized that the Foats' counsel had never viewed its contents and suggested a showing. The Foats' counsel, however, inferentially argued that a showing would be meaningless because he needed time to prepare a response. The trial court found that to give counsel adequate time to prepare would require a few days. It noted that the case had been filed in 1993 and, in effect, Torrington's efforts in regard to the videos were just too tardy. Finally, the trial court made it quite clear that its analysis and

ruling applied to both films. In succinct terms, it stated “my ruling is premised upon primarily considerations of unfairness ... and undue delay which would be a real problem in this case.”

Our review reveals no erroneous exercise of discretion on the trial court’s part in denying admission of the two films. Much to the dismay of defense counsel, the trial court may not have neatly separated its oral comments to treat the two videos individually, but it nevertheless considered the alternative arguments of counsel, considered the “surprise-ambush” factor, recognized the adverse consequences of a continuance, and concluded that unfair prejudice would result if the films were introduced into the trial. Further, the trial court determined that because the theory of the defense would be adequately presented without the videos, any delay was not reasonably warranted. The trial court did not err.

D. Public Policy.

Finally, Torrington claims that public policy warrants a reversal of the judgment. This argument, however, is raised for the first time on appeal. Therefore, we deem it waived and decline to address it. *See Wirth v. Ehly*, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

